IN THE MATTER OF THE HUMAN RIGHTS CODE S.O. 1990 CH. 19, as amended AND IN THE MATTER OF THE COMPLAINT BY LEE ANN BRUCE AND DARLENE JACKSON DATED DEC. 29, 1989 AND MARCH 17, 1990 RESPECTIVELY,. ALLEGING DISCRIMINATION IN EMPLOYMENT ON THE BASIS OF SEX, SEXUAL SOLICITATION AND HARASSMENT BY MCGUIRE TRUCK STOP AND NEIL MCGUIRE.

BOARD OF INQUIRY

PROFESSOR ERROL P. MENDES

Appearances

Ms. Sharon Ffolkes-Abrahams for the Ontario Human Rights Commission.

Mr. McGuire, Respondent, on his own behalf.

Dates and Place of Hearing: Ottawa, Ontario, December 9 & 10, 1992.

I. Preliminary Points

1. The hearing in this matter dealt with two separate complaints by Lee Anne Bruce and Darlene Jackson respectively. While the complaints arose out of separate incidents, those incidents were closely related in time and circumstances. Both also involved the same individual respondent who gave a common defence for both complaints. It was therefore decided that both complaints would be dealt with in the same hearing.

2. The respondent did not appear on the first day of the hearing. He had informed Counsel for the Commission that he had to look after a sick child and could not find a babysitter. The position of the same Counsel was that the hearing should go ahead as the respondent did not have a credible excuse for not appearing.

Counsel for the Commission informed the Board that Mr. McGuire had been informed of the time and place of the hearing on at least two occasions since November 10, 1992. Counsel also presented several items of documentary evidence which indicated that the respondent had not co-operated fully with the Human Rights investigation process and in particular had failed to fill in the respondent's questionnaire since February 30, 1992. Indeed the Commission had not heard from the respondent since March 23, 1992.

After hearing the above argument, and considering human rights jurisprudence dealing with similar situations, see Brown v. Blake, unreported decision of Ontario Board of Inquiry, 1971; Williams v. Ronlette, unreported decision of Ontario Board of Inquiry, 1973;

A. Hughes and L. White v. Dollar Snack and Deiter Jeckel, (1981) 3 C.H.R.R. D/1014 (Ontario Board of Inquiry), the Board decided pursuant to Section 7 of the Statutory Powers Procedures Act to proceed in the absence of the respondent.

However, the Board asked Counsel for the Commission to take steps to notify the respondent at some point during the first day of the content of the Board's ruling and urging him to attend on the second day to present his case.

The Board proceeded to hear testimony from four of the Commission's witnesses (not including the two complainants). The Board was informed by Counsel for the Commission after the lunch hour adjournment that Mr. McGuire would be attending on the second day of the hearings to cross-examine the two complainants and present his own case. The respondent did appear as indicated for the December 10, 1992 hearing of the testimony of the two complainants.

II. The Facts

The facts as presented by Counsel for the Commission in both complaints was largely undisputed by the respondent. The facts of each complaint shall be set out in the order in which they were presented before the Board.

The Complaint of Ms. Lee Anne Bruce

Ms. Bruce, whose date of birth is January 28, 1974, is a student attending Opeongo High School in Cobden, Ontario. She commenced part-time employment as a waitress on November 10, 1989 at McGuire's Truck Stop, an establishment owned and operated by the respondent.

She was employed to work mostly on the 3:00 p.m. to 11:00 p.m. shift. Her duties included being a waitress, cashier and dishwasher. She worked, briefly, with other waitresses, including the second complainant, Ms. Darlene Jackson. However, in the evenings after 6:00 p.m. she would be alone in the Truck Stop with the respondent.

Ms. Bruce left her employment only two days after she started. She stated before the Board that the respondent began touching her sexually while she was performing her duties and also persisted in making sexual comments and innuendos. The respondent also brought down a television and VCR from an upstairs apartment and briefly played a pornographic movie in the kitchen area in full view of Ms. Bruce, who was fifteen years old at the time.

In cross-examination, Mr. McGuire did not contest these facts, but rather only sought confirmation from Ms. Bruce that at no time did he threaten her with her job if she resisted his sexual advances.

A guidance counsellor at the school which Ms. Bruce attended, Mr. W.L. Kirby, had learned that four other female students, including Darlene Jackson, had similar experiences while working for Mr. McGuire. Together with the school principal, Mr. Kirby met

with the students and advised Ms. Bruce not to return to her employment and to inform their parents of what had taken place.

The police were eventually brought into the situation. Constable Murphy of the O.P.P. Pembroke Detachment investigated the situation and eventually charged the respondent with five counts of sexual exploitation contrary to Section 153(1) of the Criminal Code.

Mr. McGuire entered a plea of guilty to three of the charges, including those involving Ms. Bruce and Ms. Jackson. The Crown moved to dismiss the other two charges.

Mr. McGuire was fined $500.00 and one year's probation for each of the three convictions under Section 153(1)(a) of the Criminal Code.

Constable Murphy also contacted the Ontario Human Rights Commission and explained the incidents leading up to the criminal convictions. The Commission then followed up with the two complainants in this case.

The Complaint of Darlene Jackson

Ms. Jackson whose date of birth is July 27, 1974 is also a student attending Opeongo High School in Cobden, Ontario. She commenced part-time employment at McGuire Truck Stop in September of 1989 and left the same employment on November 17, 1989. Ms. Jackson usually worked the night-shift from approximately 3:30 p.m. to 11:00 p.m. and on Sundays from 7:00 a.m. to 3:00 p.m. Her

duties consisted of being a waitress, cashier and dishwasher.

A pattern of sexual harassment by Mr. McGuire was commenced even at the interview stage. The respondent asked Ms. Jackson whether she had a boyfriend and how long they had been dating and other personal questions which had nothing to do with the job description.

After two weeks, the same type of sexual touching and harassment that occurred with Ms. Bruce also took place with this complainant. In addition, Ms. Jackson was working with Ms. Bruce when the pornographic movie was played in the kitchen area. Ms. Jackson alleged that the respondent stated he wished both complainants were in the movie. Ms. Jackson shut off the movie immediately, stating it was not suitable for that working environment. As the incidents of sexual touching and harassment continued, Ms. Jackson became increasingly distressed and eventually refused to work the same shifts as the respondent. Ms. Jackson left her part-time employment with the respondent after being advised to do so by Mr. Kirby, the School Counsellor, Constable Murphy and her parents. As discussed earlier, the above incident lead to a charge being laid against Mr. McGuire and his eventual conviction of sexual exploitation of Ms. Jackson, contrary to Section 153(1)(a) of the Criminal Code. On conviction of the offence, a fine of $500.00 and one year's probation was levied against the respondent.

In his cross-examination of Ms. Jackson, Mr. McGuire did not

attempt to refute the above facts but attempted to prove that Ms. Jackson had also attempted to touch him, in the form of tickling or putting ice-cubes down his back. However, the respondent did not attempt to further prove that, if such events took place, they would amount to any form of condonation or consent to the acts of sexual touching and harassment committed by him. Finally, it should be noted that the respondent also admitted to hugging both complainants to thank them for the work they did. Both complainants indicated that such physical contact was unwelcome and not encouraged.

III. The Law as Applied to the Facts

A. Discrimination on the Basis of Sex

The relevant provision of the Ontario Human Rights Code (hereinafter "the Code") is Section 5(1) (formally Section 4(1)) which states:

> Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or handicap.

This Board has concluded that both complainants were treated differently on the basis of sex because of the poisoned work environment created by Mr. McGuire through his constant sexual touching, sexual jokes and innuendos, sexual solicitations and his exposure of pornographic material in the workplace.

This Board also considers that hugging or patting by an

employer or supervisor of employees who have not indicated their consent to such physical contact can be a prelude to or part of an environment of sexual harassment. This is certainly true in the context of the two complaints in this case.

There is now substantial human rights jurisprudence which establishes that a poisoned work environment can amount to discrimination on one of the prohibited grounds stated in Section 5(1) of the Code, including discrimination on the basis of sex, see J. Lee v. T.J. Applebee's Food Conglomeration & Ross Simpson (1988), 9 C.H.R.R. D/4781 (Ontario Board of Inquiry), (poisoned environment on the basis of racial discrimination), A.R. Gosh v. Domglas Inc., C. Fox, D. Harrison, W. Forrest C.K. Van Vliet, unreported decision of Ontario Board of Inquiry, 1992 (poisoned environment on the basis of differential treatment due to handicap); T.F. Cox & D. Cowell v. Jagbritte Inc. & Super Great Submarine & Good Eats & J. Singh Gadhoke (1982), 3 C.H.R.R. D/609 (Ontario Board of Inquiry), (poisoned environment based on sexual discrimination which also involved persistent sexual grabbing and touching despite the complainant's objections).

This Board also concludes that the poisoned work environment created by the respondent was further aggravated by the youth of the Claimants and the fact that Mr. McGuire took advantage of their age and inexperience, see A. Hall v. Sonap Canada, A. Torimiro & A. Pavelich (1989), 10 C.H.R.R. D/6126 (Ontario Board of Inquiry).

B. Sexual Harassment

Section 7(2), formerly Section 6(2) of the Code states:

> Every person who is an employee has a right to freedom from harassment in the workplace because of sex by his or her employer or agent of the employer or by another employee.

"Harassment" is now defined in Section 10 of the Code as follows:

> Engaging in a course of vexatious comment or conduct, that is known or ought reasonably to be known to be unwelcome.

The precise nature of the above provisions were examined in Cuff v. Gypsy Rest. & E. Abi-ad (1987), 8 C.H.R.R. D/3972, (Ontario Board of Inquiry).

This Board concludes that all the components of sexual harassment defined in the Cuff v. Gypsy Rest. & E. Abi-ad decision have been proved in these two complaints.

There has been more than one event of unwelcome sexual comments and conduct towards both complainants by the respondent. However, this Board would find the single outrageous event of the showing of a pornographic film in full view of the young unsuspecting complainants in the workplace by the respondent sufficient to constitute a course of conduct amounting to harassment.

The above mentioned behaviour by the respondent was certainly vexatious, subjectively from the complainants' perspective and objectively from a reasonable person's perspective. The complainants gave evidence that they did not welcome his comments or conduct and asked him to desist. This is a paradigm case of sexual exploitation by an older man of inexperienced and innocent

15 year old employees.

This Board concludes that the Human Rights jurisprudence in this area permits a finding that the youth of the complainants compounds the vexatious nature of the respondent's behaviour and weighs heavily against the possibility that the respondent did not know or could not reasonably be expected to know his comments and conduct was unwelcome, see A. Hall v. Sonap Canada, A. Torimiro & A. Pavelich (1989), 10 C.H.R.R. D/6126 (Ontario Board of Inquiry); L. Waroway v. Joan and Brian's Upholstering & Interior Decorating Ltd. & Mr. B. Pigott, unreported decision of Ontario Board of Inquiry, 1992 at 12.

This Board also concludes that the fact that the two complainants left their employment due to the respondent's conduct amounts to constructive dismissal, see M. Coutroubis & I. Kekatos (1981), 2 C.H.R.R. D/457 (Ontario Board of Inquiry). Even though Mr. McGuire stated he did not "hold their jobs over their heads", it is clear that in order to continue working in his Truck Stop, they had to endure persistent sexual touching, comments, innuendos and on one occasion exposure to pornographic material. The fact that Darlene Jackson endured this poisoned environment longer than the two days that Lee Anne Bruce worked there is of little importance. Ms. Jackson testified that she continued working as long as she did because she needed the money. The similar fact evidence provided at the hearing by two other young female employees of the respondent, Wendy Alexander, who worked for approximately eight months and Wendy Selle, who worked for

approximately seven months, indicated that the price for any young woman to earn a small salary from the respondent was to endure for as long as they could a poisoned work environment. The length of time they endured such a work environment should not be a source of prejudice against them.

This Board finds therefore that by creating a poisoned work environment due to sexual harassment, the respondent eventually effected a constructive dismissal of the two complainants.

C. **Sexual Solicitation**

Section 7(3), formerly Section 6(3) of the Code states:

> Every person has a right to be free from:
>
> (a) a sexual solicitation or advance made by a person in a position to confer, grant or deny a benefit or advancement to the person where the person making the solicitation knows or ought reasonably to know that it is unwelcome; or
>
> (b) a reprisal or a threat of reprisal for the rejection of a sexual solicitation or advance where the reprisal is made or threatened by a person in a position to confer, grant, or deny a benefit or advancement to the person.

This Board concludes that Mr. McGuire did make sexual solicitations and advances to the complainants. He was in a position to grant or deny a benefit by offering pay-raises or firing them. Ms. Bruce testified that the respondent offered her a raise after one particular incident of sexual touching.

However, this Board concludes that the structure of Section 7(3) of the Code does not require proof of the elements of both Section 7(3)(a) and Section 7(3)(b). The two subsections are

disjunctive. Therefore the respondent is in violation of Section 7(3)(a) if he is a person who is in a position to deny, confer or grant a benefit of advancement to an employee if he knows, or ought reasonably to know, that such solicitation or advance is unwelcome. There is no need to prove an actual reprisal or threat of reprisal under Section 7(3)(b).

This rightfully places employers, or any person who is in a position to deny, confer or grant a benefit or advancement to an employee, on notice that in a workplace environment they indulge at their peril in potentially unwelcome sexual solicitations or advances towards employees. The unequal positions and power imbalances between employees and employers or senior officials necessitates this standard of behaviour in the workplace environment.

Therefore, this Board concludes that the respondent is also in violation of Section 7(3), formerly Section 6(3) of the Code.

Remedial Measure

This Board, for the reasons stated above, finds the respondent in breach of Section 5(1) (formerly Section 4(1)), 7(2) (formerly Section 6(2)), 7(3) (formerly Section 6(3)) and Section 9 (formerly Section 8) of the Code.

Section 41(1) of the Code grants a Board of Inquiry extensive remedial powers for infringement of the Code. This includes the power to order restitution for loss arising out of infringement. Restitution in the context of loss of employment means the

complainants should be placed in the position they would have been in, if they had not suffered the violation of their rights under the Code and so felt compelled to leave the poisoned work environment. The Board should, however, take into account the duty of the complainants to mitigate their losses.

The complainants testified they earned between $85.00 to $100.00 per week. Ms. Jackson testified she was out of part-time work for six months and Ms. Bruce testified that she was without part-time employment for eight months. Both complainants stated that they searched diligently for alternative employment and listed for the Board the places they had applied to but were turned down. Both complainants convinced the Board they were hampered in their search for the work because they had filed a complaint against the respondent under the Code. The size of the town in which they lived meant that, in all probability, virtually all potential employers had heard of the nature of the complainants and had probably made a judgement as to the validity of the complaints.

This Board therefore assesses the first head of damages at the higher amount of $100.00 per week for Ms. Jackson for 24 weeks which would result in restitution damages of $2,400.00. Taking the higher amount of $100.00 per week for Ms. Bruce, the amount of damages is assessed at $3,200.00 for her 32 weeks without part-time employment. For a similar assessment of damages in a sexual harassment case, see M. Cuff v. Gypsy Restaurant & E. Abi-ad (1987), 8 C.H.R.R. D/3972 at D/3983.

Section 41(1)(b) (formerly Section 40(1)(b) also permits the

assessment of general damages for mental anguish.

Several factors have been suggested as relevant for a Board of Inquiry to take into account in determining the award for mental anguish.

In Torres v. Royalty Kitchenware Ltd. (1982), 3 C.H.R.R. D/858 (Ontario Board of Inquiry), these factors were stated as follows:

(1) The nature of the harassment, that is, was it simply verbal or was it physical as well?

(2) The degree of aggressiveness and physical contact in the harassment;

(3) The ongoing nature, that is, the time period of the harassment;

(4) The frequency of the harassment;

(5) The age of the victim;

(6) The vulnerability of the victim; and

(7) The psychological impact of the harassment upon the victim.

The reason why general damages for mental anguish is particularly merited in both complaints in this case is because the facts indicate that all the elements listed in the Torres decision are applicable in this case.

The respondent's behaviour that has been found in violation of the Code was both verbal and physical. In the case of Ms. Jackson, the respondent's behaviour began even at the interview stage when she was asked irrelevant and illegitimate questions about her personal life. The harassing behaviour of the respondent was aggressive and involved persistent and frequent unwelcome physical

contact with the complainants over relatively short periods of time. This Board also considers that the exposure of pornographic material in the workplace is an aggressive form of sexual harassment. The age of the complainants at the time of the harassment (they were both 15 years old) also aggravates the vulnerability of the two victims and the psychological impact of the harassment upon them. Both complainants testified they were scared because they were totally inexperienced with this type of behaviour by an older man. Further evidence of the psychological impact of the harassment was that they did not want even their parents to know about it. Moreover, Ms. Bruce testified that she was so affected by her experience with the respondent, that she did not want to work anywhere with men because of the incidents. Even at the hearings, almost three years after the incidents, both complainants were deeply angry, upset and could not hold back tears when describing the behaviour of the respondent. This Board awards $2,500.00 to each of the respondents for mental anguish. A smaller amount has been awarded in other cases, see L. Warrowary v. Fran and Brian's Upholstering & Interior Decorating Ltd. and Mr. Brians Pigott unreported decision of Ontario Board of Inquiry, 1992. The mental anguish of the two complainants in this case is perhaps even more aggravated than in the Waroway decision, because of the younger age of both complainants and the fact that in a small town like Cobden, Ontario there are greater obstacles to be faced in

mitigating losses and coming forward with the Human Rights

complaints.

However this Board has decided not to award any pre-judgement interest, as it can not be said that it is the respondent's fault that it took almost three years for the two complaints to get to this Board. Moreover, this Board has quite generously calculated the special damages for lost wages and mental anguish.

Finally, this Board orders that, should the respondent open any future business establishments in Ontario, he must report to the Ontario Human Rights Commission the hirings and resignations of any female employees so that the work environment can be monitored. It will be at the discretion of the Commission when such monitoring can cease. The respondent must also post the preamble and Sections 5, 7 and 9 of the Ontario Human Rights Code in any business premises from which he may operate.

Order

It is ordered that:

(1) The respondent pay Ms. Bruce special damages in the amount of $3,200.00 for lost wages.

(2) The respondent pay Ms. Jackson special damages in the amount of $2,400.00 for lost wages.

(3) The respondent pay Ms. Bruce the sum of $2,500.00 for mental anguish as a result of discriminatory behaviour in violation of the Ontario Human Rights Code.

(4) The respondent pay Ms. Jackson the sum of $2,500.00 for mental anguish as a result of discriminatory behaviour in violation of the Human Rights Code.

(5) If the respondent should open another business establishment, he must report to the Ontario Human Rights Commission the hirings and resignations of any female employees. The respondent must also post the preamble and Sections 5, 7 and 9 of the Ontario Human Rights Code on any business premises which he operates from.

Dated the 23rd **day of** February **, 1993 in the City of Ottawa.**

Professor Errol P. Mendes